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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-653

THOMAS S. GIBSON, ET AL.,
APPELLANTS,

VERSUS

L. M. BERRYHILL, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JURISDICTIONAL STATEMENT

J. G. L. MARSTON, III
DONALD GEORGE VALESKA, II
Assistant Attorneys General
750 Administrative Building
64 North Union Building
Montgomery, Alabama

WILLIAM BAXLEY
Attorney General of Alabama
State Capitol
Montgomery, Alabama

RICHARD A. BILLUPS, JR.,
P. O. Box 1056
Jackson, Mississippi 39205

Attorneys for Appellees

Date: November ____, 1971

BRADBACK TYPESETTING CO., 819 W. CALIF., OKLAHOMA CITY. PH. 235-0030

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In the
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No. ————

L. M. BERRYHILL, ET AL.,
Appellants,

VERSUS

THOMAS S. GIBSON, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JURISDICTIONAL STATEMENT

INTRODUCTORY PARAGRAPH

Appellants appeal directly from the judgment of the United States District Court for the Middle District of Alabama (a three-judge panel convened pursuant to 28 U.S.C. § 2284), entered on September 3, 1971, denying the motion to dismiss of the appellants, restraining and enjoining appellants, Thomas E. Gibson, E. E. Ashbee, George R. Carlton, Milton E. Warr, and Willard Smith, individually and as members of the State Board of Optometry and their successors in office from conducting a hearing on the charges

heretofore preferred against the appellees optometrists to determine what action should be taken on the evidence produced at a hearing on said charges and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The Opinion of the District Court is not yet reported. Copies of the Opinion of the Court and Judgment are attached as Appendix A.

JURISDICTION

The appeal herein is from a final Judgment made and entered by the United States District Court for the Middle District of Alabama, Northern Division, specially constituted under 28 U.S.C. §§ 2281 and 2284 holding unconstitutional Sections 192 and 206, Title 46, 1940 Code of Alabama, two state statutes and granting appellees injunctive and other relief. The Judgment appealed from was made and entered on September 3, 1971. Notice of Appeal was filed in the United States District Court for the Middle District of Alabama, Northern Division, on September 22, 1971. The jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by 28 U.S.C. § 1253 in that a final judgment was entered granting, after notice and hearing, a permanent injunction in a proceeding required to be heard and determined by a district court of three judges. The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on

direct appeal in this case. *Flash* v. *Cohen*, 392 U.S. 83 (1968); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Zwicker* v. *Koota*, 389 U.S. 241 (1967); *Perez* v. *Ledesma*, 91 S.Ct. 674 (1971).

The state statutes that are involved are Sections 192 and 206 of Title 46, Code of Alabama, which provide, as follows:

"Title 46

"§ 192. (2875) State board of optometry; how constituted.—The governer shall appoint a state board of optometry consisting of five persons each of whom shall be a citizen of the United States, over the age of twenty-five years, a member in good standing of the Alabama optometric association, incorporated, or its legal successor, and shall have been engaged in the actual continuous practice of optometry in the State of Alabama for at least five years next preceding his appointment. One member of said board shall be appointed each year for the term of five years and shall hold office until his successor is appointed and qualified. The governor may remove from office at any time any member of the board for neglect of duty, incompetency, improper or unprofessional conduct, or when the license or certificate of any member has been suspended or revoked. Vacancies on said board shall be filled by appointment by the governor in the manner hereinbefore provided. The governor shall furnish each member of said board at the time of his appointment a certificate of appointment, and each appointee shall qualify by taking the usual oath of office before the judge of probate of his home county within fifteen days from date of his appointment. (Ib.)"

Section 206:

"* * * Whenever charges are preferred against any holder of a license the board shall fix a time and place for the hearing of the same, and a copy of the charges, which must be made in writing, and verified by oath, together with a notice of the time and place where they will be heard and determined, shall be served upon the accused at least ten days before the date fixed for said hearing. When personal service cannot be effected, the board shall cause to be published at least thirty days prior to the date set for the hearing in a newspaper published in the county in which accused was last known to practice, a notice to the effect that at a definite time and place a hearing will be held by the board on charges preferred against said person. The board may compel the attendance of witnesses at said hearing; the accused shall have the right to be confronted by the persons preferring said charges, to cross-examine the witnesses against him, to be represented by counsel, and to have the testimony taken down by a stenographer, but the expense of counsel and stenographer, either or both, shall be borne by the accused. Witnesses at hearings before the board shall testify under oath and may be sworn by any member of the board. In all cases of suspension or revocation of license as herein provided for, the holder may appeal to the circuit court, or other court of like jurisdiction, in the country in which the person whose license or certificate is ordered revoked resides. (Ib.)"

All of Section 206 is shown as Appendix B.

QUESTIONS PRESENTED

1. Whether Section 192, Title 46, of the optometry law, Code of Alabama, is unconstitutional under Article IV, Section 2 and the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

2. Whether Section 206, Title 46, of the optometry law, Code of Alabama, is unconstitutional under Article IV, Section 2 and the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

3. Whether Board Rule No. 1 additionally protected the rights of plaintiffs if an appeal was taken from an adverse board ruling, after hearing, in view of the general right to supersede as provided by the Alabama law; also in holding that the State Board is illlegally constituted.

4. Whether the court erred in enjoining the State Board of Optometry and their successors in office from hearing these pending charges against the plaintiffs because of alleged pecuniary gain, bias or prejudice, before a hearing, when mandamus is provided in the Alabama law to test these questions, with right of full hearing in court.

5. Whether the court erred in finding the plaintiffs had been harassed by defendants to their irreparable damage on the evidence before it.

6. Whether the court erred in assuming from the evidence before it that a hearing before the State Board of Optometry would be a mere formality leading to revocation of the licenses of the plaintiffs.

7. Whether the court erred in overruling defendant's motion to dismiss this action.

STATEMENT

On August 4, 1965, the Alabama Legislature repealed Section 210, Title 46, 1940 Code of Alabama, and amended Section 211, which does not appear to be involved in this suit.

Section 210 and Section 211 before and after repeal and amendment are attached as Appendix C, because throughout the proceedings on this matter the repeal of Section 210 of the Alabama Optometry Law is frequently referred to. Prior to the repeal of Section 210, optical dispensaries, jewelry stores and such, were permitted to maintain an optometric department wherein eyes were examined so long as it was in charge of an optometrist. After Section 210 was repealed, there was no longer any statutory authority for such stores to maintain such departments as the Alabama courts and others have held. The optometrists employed by Lee Optical Company of Alabama, Inc. (hereinafter referred to as Lee Optical) are the plaintiffs below and appellees in this appeal and for ease of reference will be referred to hereafter as plaintiffs. The State Board of Optometry, defendant below, together with the members of the State Board and other named defendants will be hereafter referred to as defendants and the State Board of Optometry will be referred to as State Board. The plaintiffs were notified by the State Board of the repeal of Section 210 of the optometry law and requested all optometrists to comply with the optometry law as amended and this included the plaintiffs herein. This notice from the State Board is attached hereto as Appendix D.

Lee Optical and the plaintiffs made no effort to comply with the optometry law as amended and continued to advertise "scientific eye examinations" and "eyes examined." The Alabama Optometric Association, one of the defendants herein, and hereafter referred to as the Association, took note of this failure of the Plaintiffs to comply with the amended optometry law and after conducting an investigation, gathered evidence of this fact, and then authorized its president, Dr. Roy Adams, to file charges against each of the plaintiffs before the State Board and this was done and the charges and exhibits attached thereto against Dr. Harry Sparks are the same, in general, as those filed against the other defendants. Appendix D. This was done on October 23, 1965, over two and one-half months after the repeal of Section 210 of the optometry law and notice to the plaintiffs of such repeal. The affidavit of Dr. Roy Adams is attached hereto as Appendix E.

On October 25, 1965, the State Board filed an injunction suit against Lee Optical and the plaintiffs in the Circuit Court of Montgomery County, Alabama, in equity. The plaintiffs in this suit were defendants in the injunction suit along with Lee Optical and all of the defendants in that case filed a plea in abatement in the Circuit Court and this was sustained by the court and the suit dismissed and an appeal was made to the Alabama Supreme Court in this injunction suit. The parties to this injunction suit and the attorneys in the injunction suit for both Lee Optical and the optometrists are the same attorneys representing the plaintiffs in the case on appeal here. There were other suits filed by the State Board seeking injunctions against other

such optical dispensaries operating as did Lee Optical and their employed optometrists, one of which was the suit against the House of $8.50 Eyeglasses, and everyone realized that the determination of the ruling on the motion to abate in the Lee case would be decisive not only in the Lee Optical case but the other cases as well, so there was a general understanding among the attorneys for the respective parties that hearings on the charges filed with the State Board would be held in abeyance awaiting a ruling by the Supreme Court of Alabama on the appeal of the Lee Optical case by the State Board.

During the time the appeal of this Lee Optical case was pending before the Alabama Supreme Court, the Alabama Legislature passed an act giving all state licensing boards the right to bring an injunction suit against those so unlawfully practicing. Its provisions were made retroactive as well as applying to any future actions brought thereunder.

The adoption of this Section 1063(1), Title 7, Alabama Code Annotated was brought to the attention of the Alabama Supreme Court and on September 18, 1969, the Supreme Court rendered its decision, 226 So.2d 623, directing the Circuit Court to overrule the motion to abate and to proceed with the hearing of the case pending before it. As can be seen, this accounted for approximately four years, during which no effort was made to proceed with the charges against the optometrists on the charges pending against them, not only in this case but the other cases pending in other sections of Alabama.

When the Lee Optical case was reinstated, pursuant to the opinion of the Supreme Court in the Circuit Court of Montgomery County, Alabama, a demurrer on behalf of Lee Optical and the plaintiffs in this suit, was filed and without assigning reasons, the demurrers against the plaintiffs herein were sustained and the demurrer against Lee Optical was overruled so the case proceeded to trial against Lee Optical, resulting in a decree in favor of the State Board and against Lee Optical, a copy of which is attached hereto as Appendix F. A copy of this decree was attached to defendants' motion to dismiss and pursuant to Stipulation No. 23 of the stipulations, the inclusion of this exhibit is permitted. An appeal to the Alabama Supreme Court was taken by Lee Optical in this case and it is now at issue and awaiting decision by the Alabama Supreme Court.

The case of the State Board against the House of $8.50 Eyeglasses and their employed optometrists, and the charges pending before the Board against these optometrists, were held in abeyance just as they were in the Lee case. However, in the House of $8.50 case, the optometrists remained in the suit and it was tried, resulting in a decree which is attached hereto and marked Appendix G, and permitted by paragraph 20 of the stipulation. Both the House of $8.50 and their employed optometrists were enjoined from the unlawful practice of optometry and this case is now on appeal to the Alabama Supreme Court with briefs soon to be filed in this case.

The charges pending before the State Board against the plaintiff optometrists herein were scheduled for a hear-

ing on October 20, 1969, after the decision by the lower court in the Lee Optical case in Montgomery County and was continued well ahead of the scheduled hearing date by agreement of the attorneys for the parties. The charges were next scheduled for hearing on May 26 and 27, 1971, and this suit was instituted by the plaintiffs against the defendants and from an adverse decision the defendants are now before this Honorable Court on appeal.

In order to carry this matter along as rapidly as possible ,the defendants ordered a transcript of the proceedings before the three-judge tribunal which has now been filed with this Court and an index to the record is attached hereto as Appendix H.

While this statement may appear unusually long, it is felt that it was essential in order for the argument which follows to be more meaningful.

The three-judge federal court was empaneled and, after final hearing on all issues except as stated in paragraph 5 of the pre-trial order wherein plaintiffs withdrew the charge that the State Board was estopped from prosecuting its suspension of license proceedings against plaintiffs because it had annually renewed their license to practice, and the plaintiffs withdrew without prejudice, their claim for damages, a hearing was held. It denied the motion to dismiss of the defendants and enjoined the named members of the State Board of Optometry of the State of Alabama and their successors in office from conducting a hearing on the charges heretofore preferred against the plaintiffs and dismissed the cross-claim of the defendants without prejudice.

SUMMARY OF QUESTIONS PRESENTED IN THE JURISDICTIONAL STATEMENT

1. WHETHER SECTION 192, TITLE 46, OF THE OPTOMETRY LAW CODE OF ALABAMA IS UNCONSTITUTIONAL UNDER ARTICLE IV, SECTION 2, AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This is the section which provides that members of the State Board of Optometry shall be appointed by the governor from a list furnished by the Alabama Optometric Association and further that only those who are members of the Alabama Optometric Association in good standing are eligible for appointment to the State Board. The record will show that the recommendation of the Association was seldom followed and none has been made in recent years. None of the members of the State Board were recommended to the governor by the Association but they were, at the time of their appointment, and still are, members of the Association and in good standing. The trial court held this provision to be unconstitutional. In the case of *McCrory* v. *Wood*, 171 So.2d 251 (decided January 1, 1965), the Alabama Supreme Court held this section to be constitutional and according to Section 1652 of Title 28 U. S. Code, this decision is binding on the federal courts in civil actions in cases where it applies. Numerous other cases from other jurisdictions similarly holding are cited in the Statement.

2. WHETHER SECTION 206, TITLE 46, OF THE OPTOMETRY LAW CODE OF ALABAMA, IS UNCONSTITUTIONAL UNDER ARTICLE IV, SECTION

2 AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This is the section of the optometry law that provides that an appeal from a ruling of the State Board on charges, after hearing, is to the Circuit Court of the county of the residence of the optometrist charged. The trial court held this provision of the optometry law unconstitutional because it fails to provide supersedeas pending an appeal. This section also was held to be constitutional by the Alabama Supreme Court in the case of *McCrory* v. *Wood*, *supra*. We cite both Alabama cases and cases from other jurisdictions which hold that in the absence of providing supersedeas, the Alabama courts have the inherent authority to provide supersedeas where necessary to preserve the rights of the parties pending an appeal.

3. WHETHER BOARD RULE NO. 1 ADDITIONALLY PROTECTED THE RIGHTS OF PLAINTIFFS IF AN APPEAL WAS TAKEN FROM AN ADVERSE BOARD RULING AFTER HEARING IN VIEW OF THE GENERAL RIGHT TO SUPERSEDE AS PROVIDED BY THE ALABAMA LAW; ALSO IN HOLDING THAT THE STATE BOARD IS ILLEGALLY CONSTITUTED.

In order to make it clear that the State Board had no desire to take advantage of the optometrists charged in the event of some finding against them, Regulation Number 1 was adopted by the State Board of Optometry and promulgated which specifically states that no action would be taken adverse to the optometrists, after hearing, pending appeal until a final determination on the appeal or abandonment thereof.

Again in *McCrory* v. *Wood, supra,* the rule-making authority of the State Board was upheld so long as it was within the legislative grant to the Board. We cite numerous other Alabama cases in addition, showing that the appellate courts of Alabama are firmly committed to the constitutional right of the Legislature to provide for administrative boards with authority to enact regulations and that a violation of them would be a criminal offense.

4. WHETHER THE COURT ERRED IN ENJOINING THE STATE BOARD OF OPTOMETRY AND THEIR SUCCESSORS IN OFFICE FROM HEARING THESE PENDING CHARGES AGAINST THE PLAINTIFFS BECAUSE OF ALLEGED BIAS, PREJUDICE AND PECUNIARY INTEREST OF THE BOARD MEMBERS BEFORE A HEARING WHEN MANDAMUS IS PROVIDED IN THE ALABAMA LAW TO TEST THESE QUALIFICATIONS WITH RIGHT OF A FULL HEARING IN COURT.

It is the contention of the Defendant members of the State Board of Optometry that they are not biased, or prejudiced against the plaintiffs or that they would receive pecuniary gain as a result of hearing the charges against plaintiffs and they are not and should not be disqualified from hearing these charges. Stipulation No. 11 herein states the individual board members would so testify and that they could render a fair and impartial verdict on the charges brought before them. The Alabama case of *Miller* v. *Aldridge,* 103 So. 835, holds that the proper remedy to compel members of a state board to recuse themselves as disqualified to pass on a petition for revocation of certificate is by mandamus proceeding. This procedure was not followed in this case but instead the plaintiffs filed this

suit in federal court. The Court, in this case, also cites the "doctrine of necessity" which is recognized by other authorities and requires that they should hear and determine the cause, citing 15 R.C.L., page 541, in which is found the following:

> "It is well established that the rule of disqualification of judges must yield to the demands of necessity as, for example, in cases where if applied it would destroy the only tribunal in which relief could be had."

In the *Miller* v. *Aldridge* case, *supra*, the Court considered the ruling in the *Lehmann* case conclusive against injunctive relief. The Supreme Court in this case, 263 U.S. 394, 44 Sup.Ct. 128, 68 L.Ed. —, had the following to say:

> "We cannot * * * assume that the Board will be impelled to action by other than a sense of duty or render judgment, except upon convincing evidence introduced in a regular way, with opportunity of rebuttal."

There are numerous other cases cited supporting this question.

5. WHETHER THE COURT ERRED IN FINDING THE PLAINTIFFS HAD BEEN HARASSED BY DEFENDANTS TO THEIR IRREPARABLE DAMAGE ON THE EVIDENCE BEFORE IT.

Defendants urge there has been absolutely no evidence of harassment of the plaintiffs as alleged in their complaint. The three suits referred to in the complaint were decided in 1954 and 1959 and the *McCrory* v. *Wood* case, *supra*, was decided January 21, 1965, all being prior to the filing of charges involved herein. The other alleged acts on the part of the State Board are not sufficient to dis-

qualify the State Board from hearing the charges pending against plaintiffs. Other cases cited deal with optometry as a profession in the health care field and the commercial practice of optometry involved herein and other cases cited in the statement.

6. WHETHER THE COURT ERRED IN ASSUMING FROM THE EVIDENCE BEFORE IT THAT A HEARING BEFORE THE STATE BOARD OF OPTOMETRY WOULD BE A MERE FORMALITY LEADING TO THE REVOCATION OF THE LICENSES OF THE PLAINTIFFS.

The trial court was not justified in making this assumption from the evidence before it for the reasons set out in the statement and, in addition, in view of the *Lehmann* case, *supra*, which holds against making any such assumption.

7. WHETHER THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO DISMISS THIS ACTION.

We cite numerous cases in the statement, among which is *McCrory* v. *Wood*, *supra*, wherein the Alabama Supreme Court held Sections 192 and 206 of the optometry law to be constitutional and that a state board should not be enjoined because the proper way to challenge the qualifications of board members to sit is by mandamus as pointed out in the *McCrory* v. *Wood*, *supra*, and numerous other citations from other jurisdictions holding that the filing of an injunction suit such as this is not the proper way to raise the questions set out in the first and second causes of action of the plaintiffs' complaint and that the trial court erred in enjoining the

State Board and their successors in office because in Alabama there is no other law providing for the appointment of another optometry board and the action by the trial court left no other tribunal to hear the pending charges.

For the reasons assigned above and in the questions presented, the defendants below and appellants herein urge reversal of the trial court and its granting of an injunction and further, that this suit be dismissed at the cost of plaintiffs, the appellees herein.

THE QUESTIONS ARE SUBSTANTIAL

I.

Whether Section 192, Title 46, of the optometry law, Code of Alabama, is constitutional under Article IV, Section 2 and the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

The questions presented on this appeal go directly to the constitutionality of all licensing boards when the court held unconstitutional Section 192, Title 46, Code of Alabama, which is the section that provides that members of the State Board of Optomerty must be members in good standing of the Alabama Optometric Association to be eligible for appointment by the governor as members of the State Board. This provision is contained in most of the laws creating licensing boards not only in the health-care field but in other fields of endeavor also. We urge that the court committed error in holding this section of the optometry law to be unconstitutional and in enjoining the State Board from proceeding to hear the charges pending before it against the plaintiffs in this case. The optometry

law contains no provision for the appointment of another board to hear the charges and no other law in Alabama provides for transferring the hearing to any other board in Alabama. The court erred in also enjoining the successors in office of the State Board of Optometry, which precluded the possibility of the present members of the State Board resigning and requesting the governor to appoint another Board. It is our contention that Section 192 is constitutional and has so been declared by the Alabama Supreme Court in the case of *McCrory* v. *Wood, et al.*, 171 So.2d 251 decided January 1, 1965), when this same question was raised. The Court said:

"(2) It is the position of the appellant that § 192 must be declared unconstitutional because the requirement that appointees of the State Board of Optometry must be 'a member in good standing of the Alabama optometric association, incorporated, or its legal successor * * *.' He insists that the quoted qualification constitutes an unlawful discrimination and deprivation of privileges, immunities and property rights of all licensed optometrists in the state who are not members of the Alabama Optometric Association, Incorporated. It is obvious that any optometrist who works for a corporation and allows his name to be used in advertisements as does appellant would not qualify for membership in the Alabama Optometric Association and therefore would not have the qualifications to serve on the State Board of Optometry under the provisions of this section, even though such employments and acts are specifically authorized by the legislature by §§ 210 and 211, supra.

* * * * * *

"* * * The question seems to be whether there is a substantial and rational relation between the organi-

zation entrusted with the power of nomination or appointment and the function of government which the persons appointed are to perform. If so, then the statutes are generally held to be valid. A general statement on this subject appears at 12 Am.Jur. 231, § 534:

> 'Constitutional attacks have been occasionally made on statutes providing for the establishment of official boards and commissions appointed by private associations and organizations. The argument has been made that such laws amount to the granting of special privileges and to a denial of the equal protection of the laws. The trend of judicial authority is to sustain such legislation.'

For example, the courts have sustained statutes establishing boards of medical examiners to be composed of members appointed by the several medical associations within the state and even permitting one society to name more members than others were permitted to name, and also a statute providing for a municipal plans commission, the members of which were to be appointed by various enumerated organizations."

Further, at 16A C.J.S., *Constitutional Laws*, § 460, p. 179:

> "Statutes have been sustained which have given the right to association or societies of persons belonging to a particular profession to appoint the members of the state board of examiners for the profession, and the same is true of a statute providing that members of the bar shall nominate persons from whom the court shall select jury commissioners, * * *."

There is an extensive annotation in 97 A.L.R.2d 373 on the power of appointment or nomination. The case of *Marks* v. *Frantz* (1956), 298 P.2d 316, found on page 373,

involves the constitutionality of the appointment of an optometry board by the governor from a list of names supplied to him by the Kansas Optometric Association. The Court in upholding the constitutionality of the act stated that where the constitution of the state did not provide a method of appointment, then the Legislature was free to exercise its power in providing for appointments to state boards and the Court stated it was relying on what it deemed the "clear weight of authority" in other jurisdictions, where the courts upheld the constitutionality of such statutes and noted that many examples of restrictive powers of appointment were to be found under various state statutes indicating a settled legislative pattern.

For a partial listing of cases supporting the conclusion of constitutionality of such provisions as contained in Section 192 of the Alabama optometry law, we show a few as follows:

McCurdy v. *Jessop* (1915), 126 Md. 318, 95 Atl. 37, and *Lanza* v. *Wagner* (1962), 11 N.Y.2d 317, 229 N.Y.S.2d 380, 183 N.E.2d 670, 97 A.L.R.2d 344, *App. dismissed* 371 U.S. 74, 9 L.Ed.2d 163, 83 S.Ct. 177, *cert. den.* 371 U.S. 901, 9 L.Ed.2d 164, 83 S.Ct. 205 (both *supra*, § 3(b) in 97 A.L.R.2d 382).

In addition to the above cited cases, we find that Section 1652 of the Federal Rules of Civil Procedure provides as follows:

> "The laws of the several states, except where the constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in simple actions in the courts of the United States, in cases where they apply."

2.

Whether Section 206, Title 46, of the optometry law, Code of Alabama, is constitutional under Article IV, Section 2 and the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

We believe the court erred in holding Section 206 of the Alabama optometry law unconstitutional for the principal reason that even though an appeal is provided from a ruling of the State Board on charges, after hearing, to the Circuit Court of the county of residence of the optometrists charged (Appendix B), it fails to provide supersedeas pending appeal and the court held this invades the very core of the due process of law and consequently held Section 206 to be unconstitutional.

The court, in its opinion, pointed out that supersedeas is within the power of the state court without such specific statutory authority therefor and cites authority to support this and further that an appeal from a judgment when no statute requires a supersedeas bond to effect a suspension, ordinarily suspends the judgment without such bond and cites Alabama cases to support both contentions. (See the Opinion, pages A2-A9 of Appendix A.) In addition, the case of *Riley* v. *Wilkinson*, 25 So.2d 384, 389 (Ala.), holds that if no supersedeas is provided it is within the inherent authority of the courts of Alabama to provide supersedeas where necessary to preserve the rights of the parties pending appeal, including the right of the Alabama Supreme Court to do so.

The record in this case clearly reflects that there has been no desire or effort on the part of the State Board of

Optometry to take any undue advantage of anyone in the handling of these charges and hearings thereon. They were continued for a number of years by general agreement in order to make a test case involving the corporate employers rather than make a test case out of the charges before the Board by scheduling a hearing on these charges in years past. Upon the filing of this suit, the attorney for plaintiffs was advised that there was no necessity of issuing a temporary restraining order because the Board would voluntarily continue the hearings on the charges before it, involving the plaintiffs herein, and this is reflected in the opinion of the court which mentions that the State Board has voluntarily withheld action on these charges.

The constitutionality of Section 206 of the Alabama law was raised in the case of *McCrory* v. *Wood, supra,* and its constitutionality was upheld except for one provision that was found to be contrary to Section 210 prior to the time it was repealed. (This provision stated the Board could not later adopt the *Rules of Ethics* of the Alabama Optometric Association as its own.)

3.

Whether the Board Rule No. 1 additionally protected the rights of plaintiffs if an appeal was taken from an adverse Board ruling after hearing, in view of the general right to supersede as provided by the Alabama law; also whether the court erred in holding that the State Board is illegally constituted.

In order to make it plain that the State Board had no desire to take advantage of the optometrists charged in the event of some finding against them Regulation 1 was adopted and promulgated which specifically states that no action would be taken adverse to the optometrists, after a hearing, pending an appeal until a final determination on the appeal or abandonment thereof. This regulation is attached as Appendix J.

Again, in *McCrory* v. *Wood, supra,* the rule-making authority of the State Board was upheld so long as the regulation was within the grant to the Board from the Legislature. Other cases upholding the rule-making authority of the state boards are:

In the case of *State* v. *Keel,* 35 So.2d 625, we find that rule-making authority is well settled in Alabama when within the frame work of legislative enactment and quote from this case as follows:

> "The appellate courts of this State are firmly committed to the constitutional right of the Legislature to provide for the creation of administrative boards and commissions with authority to enact regulations and change them from time to time, and that a violation of them will be a criminal offense. Ferguson v. Starkey, 192 Ala. 471, 68 So. 348; McElderry v. Abercrombie,

213 Ala. 289, 104 So. 671; Alabama Public Service Commission v. Mobile Gas Co., 213 Ala. 50, 104 So. 538, 41 A.L.R. 872; State v. McCarty, 5 Ala. 212, 59 So. 543; Ferguson v. Commissioners' Court of Jackson County, 187 Ala. 645, 65 So. 1028; Bond v. State Board of Medical Examiners, 209 Ala. 9, 95 So. 295; Parke v. Bradley, 204 Ala. 455, 86 So. 28; Hill v. Cameron, 194 Ala. 376, 69 So. 636; Horn v. State, 17 Ala. App. 419, 84 So. 883; Reims v. State, 17 Ala. App. 128, 82 So. 576."

According to the record, Dr. Thomas Gibson, member of the Board, verified the bill of complaint against Lee Optical and the plaintiff optometrists (also defendants therein) at the time of filing of the suit in 1965. In order to avoid any possible controversy on this question, the Regulation 1 went on to announce that if Dr. Gibson was challenged for cause, he would be excused from participating in the hearing. It, therefore, appears there could be nothing fairer done by the State Board in protecting or preserving the rights of the persons charged involved in this case.

The finding of the court that the statutes under which plaintiffs are being prosecuted, as they pertain to the plaintiffs' right to appeal from any adverse decision unconstitutional in providing no method of supersedeas pending court review of an adverse finding was error. The court in its opinion cites Alabama cases to the effect that supersedeas is within the power of the courts without statutory authority therefor. In addition, State Board Rule No. 1 provides for automatic supersedeas pending any appeal from an adverse decision and the above holding that this section of the optometry law was unconstitutional is error.

The court committed error in holding that the State Board of Optometry is illegally constituted in that only about one-half of the participating optometrists of the state may participate in the government of their profession. The stipulation, paragraph 7, states the Alabama Optometric Association consists of approximately 100 members. The statement that 192 optometrists are licensed in Alabama is not contained in the stipulation and no doubt came from arguments or one of the briefs. Neither is it mentioned in the pre-trial order. Had it been known that the court would assume that there were 92 optometrists employed by other persons or other entities, just as were the plaintiffs herein, the correct figures would have been immediately forthcoming. These disclose that at the time this suit was filed 113 optometrists were members of the Association and that less than 40 optometrists were employed by other persons or entities such as Lee Optical Company of Alabama, Inc. This leaves 39 optometrists who have their own individual professional practice and for various reasons have elected not to apply for membership in the Association, membership in which is purely voluntary, and in light of these figures, had they been requested, they would show the Alabama Optometric Association is truly representative of the optometrists in Alabama.

Through inadvertence in paragraph 6 of the stipulation, it shows Dr. Ashbee as a member of the State Board at the time of the filing of the complaint and charges against plaintiffs. Dr. George W. Posey was a member at that time and Dr. Ashbee replaced him, upon the expiration of his term, some two or three years later. Since going off of the State Board, Dr. Posey did not continue his member-

ship in the Alabama Optometric Association. Also through inadvertence in paragraph 7 of the stipulation, the reference to American Optical Association should have been American Optometric Association.

In Alabama the question is well settled that optometry is a profession in the health care field. In the case of *Hampton* v. *Bracken's Jewelry Company* (1939), 137 Ala. 212, 186 So. 173, the Alabama Supreme Court, in the opinion in this case, lays the legal predicate upon which relief is sought in these cases by the State Board of Optometry because plaintiffs are charged with violation of several sections of the optometry law as set out in the charges against Dr. Sparks, Appendix D, and should be granted by the Court. From the body of the opinion we quote as follows:

> "The Legislature recognized the fact that no one, without the requisite skill and knowledge, should be allowed to practice optometry, and hence by Section 2880 of the Code a standard examination is required, which shall consist of tests in practical, theoretical and physiological optics, in theoretical and practical optometry, and in the anatomy and physiology of the eye and in pathology as applied to optometry.
>
> "Thus it would appear that the Legislature has seen proper to recognize and regard optometry as a profession, one requiring knowledge of the functioning of the eye, its anatomy, and the pathology as applied to optometry."

In *Busch Jewelry Company, et al.* v. *State Board of Optometry*, 62 So.2d 770, the Mississippi Supreme Court upheld the injunction issued by the Chancellor of the

Chancery Court in Hinds County, Mississippi, wherein he held the following:

> "The Court further finds that Dr. Dooley is not practicing medicine and is only a 'front' for the defendant, Busch Jewelry Company, to practice optometry.
>
> * * * * * *
>
> "It is further the opinion of the Court that the Defendant Busch Jewelry Company, did not employ Dr. Dooley because of any learning or knowledge of the eye that he may have, but solely for the purpose of the practice of optometry by the defendant jewelry company. The defendant, Dr. Dooley, cannot work for the best interest of the unfortunate persons coming into the jewelry store for examination of eyes, but is working solely for the best interest of the defendant jewelry company. In order for the defendant, Dr. Dooley, to receive his pay it is necessary that he prescribe glasses to be sold to the patients by the defendant jewelry company."

Upon appeal, the Mississippi Supreme Court upheld the decision of the lower court and used much the same language in doing so. Busch Jewelry Company and its employee, Dr. Dooley, then appealed this decision of the Mississippi Supreme Court to the United States Supreme Court on certiorari and the Supreme Court denied certiorari—346 U.S. 83, 98 L.Ed. 354, 84 S.Ct. 34.

This brings us to what is often called the Oklahoma case of *Lee Optical of Oklahoma, Inc., et al.* v. *Mac Q. Williamson, Attorney General of the State of Oklahoma, et al.* This Lee Optical of Oklahoma is a subsidiary of the parent Lee Optical Company in Dallas, Texas, just as Lee Optical of Alabama is. This suit was instituted in the Dis-

trict Court of Oklahoma to have an Oklahoma law declared unconstitutional for the reason it allegedly violated various provisions of the Federal Constitution much as the plaintiffs in the case at bar have attacked Sections 192 and 206 of the Alabama Optometry Law. The matter was heard by a District Court of three judges. Upon appeal from the three-judge Court decision, 120 F.Supp. 128, to the U. S. Supreme Court the statute dealing with advertising and other questions of eyeglass fitting and held (75 Sup.Ct. 461, 348 U.S. 483) the statute to be constitutional, a part having been declared unconstitutional by the three-judge Court. In this case we find the following in the opinion:

"An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation, as Judge Murrah said in dissent below; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. Therefore, the legislature might conclude that to regulate one effectively it would have to regulate the other. Or it might conclude that both the sellers of frames and the sellers of lenses were in a business where advertising should be limited or even abolished in the public interest. Semler v. Dental Examiners, supra. (294 U.S. 608) The advertiser of frames may be using his ads to bring in customers who will buy lenses. If the advertisement of lenses is to be abolished or controlled, the advertising of frames must come under the same restraints; or so the legislature might think. We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers.

"Fourth, the District Court held unconstitutional as violative of the Due Process Clause of the Fourteenth

Amendment, the provision of § 4 of the Oklahoma Act which reads as follows:

"'No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store.'

"It seems to us that this regulation is on the same constitutional footing as the denial to corporations of the right to practice dentistry. Semler v. Dental Examiners, supra. It is an attempt to free the profession, to as great an extent as possible from all taints of commercialism. It certainly might be easy for an optometrist with space in a retail store to be merely a front for the retail establishment. In any case, the opportunity for the nexus may be too great for safety, if the eye doctor is allowed inside the retail store. Moreover, it may be deemed important to effective regulation that the eye doctor be restricted to geographical locations that reduce the temptations of commercialism. Geographical location may be an important consideration in a legislative program which aims to raise the treatment of the human eye to a strictly professional level. We cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds."

These Supreme Court cases are quoted first to show that optometry cases and commercialism have been before the Supreme Court in other cases and secondly because the same Legislative Act that repealed Section 210 of the Optometry Law drastically limited the right of advertising by also amending Section 211. While this Section is not directly an issue in this case yet it shows how advertising

brings customers to Lee Optical and to the optometrist, either employee or lessee.

With reference to Stipulation 12 in this case, the plaintiffs if called to testify, would testify that Lee Optical Company of Alabama, Inc., had never interfered with their professional practice or professional judgment. In this connection, there are cases which hold that a 10-day cancellation clause in an employment or lease contract between a corporation and optometrist or physician is an exercise of control by the corporation over the optometrist and the nature of his handling patients and the eye examination he conducts. The case of *State ex rel. Beck* v. *Goldman Jewelry Co.*, 51 P.2d 995, involved a situation where the company leased space to a licensed optometrist with a 10-day cancellation clause in the lease. In holding the Jewelry Company was unlawfully practicing optometry the Supreme Court of Kansas said:

> "* * * An examination of the contract between the defendant corporation and its employee Jacobs shows the lack of Jacob's control, for the company can dispense with his services on ten (10) days notice whenever it concludes he is not producing enough sales of glasses to those referred to him for tests of the eyes."

There are other such cases cited in the case of *Sears Roebuck & Co.* v. *Mississippi State Board of Optometry*, 213 Miss. 710, 57 So.2d 726.

The fact that Lee Optical was able to change all of its optometrists from that of employees to lessees almost over night by phone in itself shows control over the optometrists by Lee Optical. In addition on page 328 of the record

or transcript of the testimony of Dr. Gene Shanbaum in the Lee Optical case, he being an official of the Company, said if a lessee optometrist of theirs sent too many of their customers to another outside optometrist over an extended period of time for an examination he would probably cancel his lease. While the questions and answers represented an exaggerated situation it nevertheless demonstrated that the 10-day cancellation clause was a method of control over the lessee optometrists.

While the defendants deny there was any wrong-doing on the part of the members of the State Board in the handling of these charges from the time they were filed in 1965, and continued from time to time by agreement of counsel, we, nevertheless, quote from the case of *Wagner v. Ezell*, 154 S.E.2d 731, on the question of whether there was any impropriety in Dr. Gibon's verifying the bill of complaint filed in the Circuit Court at Montgomery against Lee Optical and the plaintiffs, we quote as follows from the body of this case:

> "The fact, standing alone, that a Board member, acting within the scope of his proper ministerial functions, participated in the origination of the charges against a licensee is not grounds for disqualification.
>
> "In an Annotation appearing in 97 A.L.R.2d 1210, 1214, entitled *Disqualification, for bias or interest, of member of occupation or profession sitting in license revocation proceeding*, it is said:
>
> 'Absent a showing of some other prejudice, bias, or interest, the fact that a member of the hearing tribunal sitting at the license revocation or suspension proceedings also belonged to the professional or occupational organization which initiated or

prosecuted the charges against the licensee is not sufficient reason to disqualify the member.'

"And then continuing at Page 1215 of this same Annotation:

'There is authority from several jurisdictions that disqualification for bias or interest will not result where the hearing body or its subordinates, acting within the scope of their proper ministerial functions, participated in the origination of charges against the licensee.'

"The information which came to the attention of the Board members resulting from their investigation is not greatly, if at all, different from the testimony of Wagner himself, and there is no real dispute as to the evidence or facts involved in this case. Disqualification was not required under these facts."

Then, again we quote from this *Wagner* v. *Ezell* case, *supra*, on the question of the optometry law on appeal, merely providing for an appeal to the Circuit Court of the residence of the optometrists against whom an adverse decision has been rendered. We quote from the body of the opinion as follows:

"Failure of the statute to provide for an appeal does not deprive Wagner of adequate review. In the case of Feldman v. South Carolina Tax Commission, 203 S.C. 49, 26 S.E.2d 22, this Court said:

'The law provides no mode of procedure for appeal from the order of the Tax Commission revoking the license of a retail liquor dealer. It is generally held, however, that the method of reviewing the action of a board or tribunal in revoking a liquor license is by a writ of certiorari, upon the theory

that while such bodies do not exercise the "judicial power of the state," as that phrase is used in conferring judicial power upon the courts of the state, they do exercise a quasi judicial power in such matters.'

"Similar review is available to Wagner."

In the case of *Seidenberg, M.D.* v. *The New Mexico Board of Medical Examiners*, 462 P.2d 469, we find more on the question of initiation of charges and we quote from the body of the opinion as follows:

"The Board is the one tribunal vested with power to revoke a doctor's license, just as the Supreme Court of New Mexico is the only body with power to disbar a lawyer. In State ex rel. Yuhas v. Board of Medical Examiners, 135 Mont. 381, 339 P.2d 981 (1959), it was held that the Board had exclusive jurisdiction of the granting and revoking of certificates admitting physicians and surgeons to practice and, in view of the fact statutes do not provide for disqualification of board members, proceedings before the Board may not be restrained merely by reason of the fact that the Board itself initiated the proceedings against a physician and was, therefore, an interested party. See 42 Am.Jur., Public Administrative Law, § 21 at 312; and Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954).

"The fact that the charges are made by the same body which tries the issues does not, in itself, operate as a disqualification. Neither does zeal in the performance of a public duty disqualify. 1 Am.Jur.2d, Administrative Law, § 64, at 861; New Jersey State Board of Optometrists v. Nemitz, 21 N.J.Super. 18, 90 A.2d 740 (1952).

"In Brinkley v. Hassig, 83 F.2d 351 (10th Cir. 1936), it was held that disqualification will not be permitted

to destroy the only tribunal with power in the premises, although a disqualified member may not act if the law provides for substitution of personnel on the board or court, or if another tribunal exists to which resort may be had.

"* * * The record in the instant case supports the Board's decision by clear and convincing evidence and the decision of the Board is neither unreasonable, arbitrary nor capricious. Appellees, as found by the Board, were guilty of dishonorable and unprofessional conduct and the licenses issued to appellees by the Board should be revoked."

It is a well settled principle of law that a reviewing trial judge cannot substitute his judgment for the judgment of the board following a hearing and this was so held as follows in this *Seidenberg, M.D.* v. *The New Mexico Board of Medical Examiners, supra:*

"We hold that the trial judge substituted his judgment for the judgment of the Board; therefore, the decision of the trial court is reversed and the case remanded with instructions to affirm the decision of the Board.

"It is so ordered."

Again from *Seidenberg, supra,* on the question of constitutionality of a legislative act requiring that Board members be appointed by the governor from a list of 5 nominees for each position from the State Medical Society, the constitutionality of this act was questioned and in the body of the opinion, we find as follows:

"Appellees do not challenge the right of the legislature to create a Board of Medical Examiners and to

vest authority in the Board to institute appropriate disciplinary proceedings for the revocation or suspension of a physician's license to practice medicine. They do complain, however, that the statute creating the Board has usurped the governor's power of appointment of members of the Board by restricting the governor's choice to nominees of the New Mexico Medical Society.

"In accordance with § 67-5-1, supra, the nominees submitted by the Medical Society must be 'qualified.'

"Appellees rely on State ex rel. Swope v. Mechem, 58 N.M. 1 at 6, 265 P.2d 336 at 339 (1954), wherein we quoted from 42 Am.Jur., Public Officers, § 94 at 952:

> '* * * where the Constitution makes the act of appointment an executive one, it cannot be exercised by the legislature, nor can the legislature rob the executive of such power by conferring it on an outside agency of its own choosing.'

We distinguish this from the instant case in that we are not faced with a constitutional delegation to the executive of the power of appointment to the Board. Here, the legislature delegated such power to the executive and may establish qualifications for Board members. New Mexico Constitution, Art. VII, § 2(B), (1967 Pocket Supp.) provides:

> 'The legislature may provide by law for such qualifications and standards as may be necessary for holding an appointive position by any public officer or employee.'

"It is to be noted that the Board appointed by the governor has the power to grant licenses to qualified physicians to practice medicine, yet appellees contend that the Board could not revoke their licenses to practice. This is incongruous and not a tenable position in

so far as appellees are concerned. See, Annot. 65 A.L.R.2d 662 at 682.

"The constitutionality of a statute is presumed. Doubts concerning its constitutionality are to be resolved in favor of legality and, before a statute may be stricken down, it must clearly appear that it offends applicable constitutional provisions. See, Community Public Service Co. v. New Mexico Public Service Comm'n, 76 N.M. 314, 414 P.2d 675 (1966); Silver City Consol. Sch. Dist. No. 1 v. Board of Regents, 75 I.M. 106, 401 P.2d 95 (1965), and cases cited therein.

"In the Annot. 97 A.L.R.2d 361 at 373, commenting on Marks v. Frantz, 179 Kan. 638, 298 P.2d 316 (1956), we find the following:

> '* * * [P]laintiff sought (1) a determination that an act creating a board of examiners for the examination and registration of optometrists was invalid in that it directed the governor to appoint members of the board from a list of names supplied to him by the Kansas optometric association, thus depriving the governor of his power of appointment and conferring it on a private corporation in violation of the state constitution, * * *. Relying on what is deemed the "clear weight of authority" in other jurisdictions, the court upheld the constitutionality of the statute, noting that many examples of restrictive powers of appointment were to be found under various state statutes, indicating a settled legislative pattern.'

"The governor is obligated to appoint to the Board nominees submitted by the New Mexico Medical Society, and only the governor has this prerogative."

4.

Whether the court erred in enjoining the State Board of Optometry and their successors in office from hearing these pending charges against the plaintiffs because of alleged pecuniary gain, bias or prejudice, before a hearing, when mandamus is provided in the Alabama law to test these questions with right of full hearing in court.

The plaintiffs allege bias, prejudice and pecuniary interest as grounds for disqualification of the members of the State Board of Optometry from proceeding with a hearing of the charges pending before it against the plaintiffs herein. This question in varying aspects has been before the courts many times. It is the contention of the defendant members of the State Board of Optometry that they are not biased or prejudiced against the plaintiffs and they are not and should not be disqualified from hearing these charges. There are cases which hold to the effect that the board hearing charges against a person is, strictly speaking, merely performing an administrative action and a board member who was prejudiced or biased against the accused is not disqualified. *Dyment* v. *Board of Medical Examiners* (1928), 268 Pac. 1073; *Winning* v. *Board of Dental Examiners* (1931), 300 Pac. 866.

This case involves an effort on the part of the plaintiffs to disqualify the members of the Alabama State Board of Optometry and to enjoin them from hearing the charges pending against them. The *Miller* v. *Aldridge* case, 103 So. 835, cited by the plaintiffs and the trial court in support of their position and contention, holds that the proper remedy to compel members of a state board to

recuse themselves as disqualified to pass on a petition for revocation of certificate is by mandamus. This procedure was not followed in this case but instead the plaintiffs filed this suit in federal court. Also in the *Miller* case, the Court cites the "doctrine of necessity" which is recognized by other authorities and requires that they should hear and determine the cause citing 15 R.C.L., page 541, in which is found the following:

> "It is well established that the rule of disqualification of judges must yield to the demands of necessity, as, for example, in cases where if applied it would destroy the only tribunal in which relief could be had."

Cited as in support of the text are: *Bliss* v. *Caille Bros. Co.*, 149 Mich. 601, 113 N.W. 317, 12 Ann.Cas. 513; *In re Ryers*, 72 N.Y. 1, 28 Am.Rep. 88; *Galey* v. *Montgomery County*, 174 Ind. 181, 91 N.E. 593, Ann. Cas. 1912C, 1099; *State* v. *Polley*, 34 S.D. 565, 138 N.W. 300, 42 L.R.A. (N.S.) 788.

In this *Miller* v. *Alridge* case, *supra*, the Court considered the ruling in the *Lehmann* case conclusive against injunctive relief. The Supreme Court in the *Lehmann* case, 283 U.S. 394, 44 S.Ct. 128, 68 L.E. —, said:

> "We cannot * * * assume that the board will be impelled to action by other than a sense of duty to render judgment, except upon convincing evidence introduced in a regular way, with opportunity of rebuttal."

Since the hearings have not been held on the charges pending before the State Board against the plaintiffs, we believe the affidavit of Dr. James L. Cash to be of significant importance in passing on the questions here involved

and his affidavit is attached as Appendix I. Also, the affidavit of Dr. Adams, previously attached as Appendix E, takes on added significance on the question of whether the defendant State Board of Optometry should be permitted to proceed with a hearing on these charges.

Again, returning to 97 A.L.R.2d, page 1214, we find the following:

Absent a showing of some other prejudice, bias, or interest, the fact that a member of the hearing tribunal sitting at the license revocation or suspension proceedings also belonged to the professional or occupational organization which initiated or prosecuted the charges against the licensee is not sufficient reason to disqualify the member.

"Colorado.—State Board of Dental Examiners v Miller (1932) 90 Colo 193, 8 P2d 699, cert den 287 US 563, 77 L ed 496, 53 S Ct 6; State Board of Dental Examiners v Patch (1932) 90 Colo 207, 8 P2d 704; State Board of Dental Examiners v Walsh (1932) 90 Colo 208, 8 P2d 704.

"Illinois.—See Bruce v Department of Registration & Education (1963) 26 Ill 2d 612, 187 NE2d 711, supra § 2[b].

"Louisiana.—Michon v Louisiana State Board of Optometry Examiners (1960, La App) 121 So 2d 565."

In 97 A.L.R.2d, page 1215, we find there is authority from several jurisdictions that disqualification for bias or interest will not result when the hearing body acting

within the scope of their proper ministerial functions, participated in the origination of charges against the licensee.

"United States.—Brinkley v Hassig (1936, CA10 Kan) 83 F2d 351, infra § 4[a].

"California.—Berry v Alderson (1922) 59 Cal App 729, 211 P 836; Winning v Board of Dental Examiners (1931) 114 Cal App 658, 300 P 866.

"Florida.—Hogan v State (925) 89 Fla 388, 104 So 598 (judge held not legally disqualified from proceeding with a disbarment action which he had caused to be commenced pursuant to statute).

"Illinois.—Tarr v Hallihan (1940) 375 Ill 38, 30 NE 2d 421 (where charges against a dentist were filed by an employee of the department which appointed the dentists to sit on the revocation examining committee).

"Minnesota.—Reyburn v Minnesota State Board of Optometry (1956) 247 Minn 520, 78 NW2d 351.

"Montana.—State ex rel. Yuhas v Board of Medical Examiners (1959) 135 Mont 381, 339 P2d 981.

"New Jersey.—Gross v New Jersey State Board of Optometrists (1933) 11 NJ Misc 485, 167 A 25."

While it is undisputed that the charges in this case were initiated by the Alabama Optometric Association through its president, Dr. Roy Adams, rather than by the State Board or any member thereof, the contention of the plaintiffs for disqualification of the State Board in this regard is without merit. While it is true that Dr. Thomas Gibson verified the bill of complaint of the suit filed against Lee Optical Company of Alabama, Inc., and the plaintiff optometrists, his deposition testimony indi-

cates that he did so without going into the merits of the case or forming any conclusion with reference to the plaintiff optometrists and thus in performing a purely ministerial act, should not be disqualified.

Counsel for plaintiffs in their memorandum brief on the merits of the case (R. 548) pending before the three-judge hearing tribunal states, beginning on page 4, that:

> "The involvement of state board members in the investigation and institution of charges against the plaintiffs and the involvement of the board members with the Alabama Optometric Association in securing passage of legislation, the violation of which is the basis of charges brought herein, is illustrated in the minutes of the State Board of Optometry attached as an exhibit to the deposition of Dr. Willard Smith's testimony. A cursory examination of those minutes from August 20, 1965 to the present are shown in the Record now on file and shown in the index (App. H) beginning on page 4 of Plaintiffs' Brief which starts at page 548)."

An examination of the excerpts from these minutes clearly shows that any discussion between themselves and their legal counsel had to do with the status of the lawsuit (pending over a 5-year period from filing to trial) and particularly the one against the plaintiffs herein and the corporate employer, Lee Optical Company of Alabama, Inc., after the defendant optometrists had gone out on demurrer. In every instance quoted from the minutes the discussion involved litigation pending and one instance where the State Board accepted the Association's recommendation as to employment of Board counsel. In only one other instance in the quoted minutes was any reference

made to charges presented to the Board and this was on another optometrist who is not a party to this suit and as reflected by the minutes, the Board merely instructed its attorney to proceed against the individual optometrist. There is nothing here which indicates bias, prejudice or any disqualifications of the Board to hear the pending charges.

Again, quoting from 97 A.L.R.2d, page 1219, in the case of the *Board of Medical Examiners* v. *Stewart* (1954), 102 A.2d 248 (Md.), the Court of Appeals expressed the opinion that there was error in declaring that the rehearing of the revocation proceedings should be held before a completely different board because all of the doctors on the first board were legally prejudiced by having already publicly committed themselves to an adverse interpretation in the void order of revocation. "While the high court acknowledged that due process requires that a fair and impartial hearing be given in cases of license revocation, it pointed out that disqualification will not be permitted to destroy the only tribunal with power in the premises, and then continued to its major holding that the general rule that a judge who presided at the trial of a case which is reversed and remanded for a new trial is not disqualified to retry the case, unless there is a contrary statutory provision, undoubtedly applies to members of administrative agencies because usually the procedure of such agencies is less strict and formal than that of the courts. On this reasoning, the court concluded that the lower court opinion of disqualification was not binding upon the board."

Again from page 1221, 97 A.L.R.2d, on the question of pecuniary interest on the part of the Board members, we find the following:

> Where a beauty school owner and operator whose students also performed services for the public challenged the appointment of two beauty shop operators as committee members to sit at a hearing on a complaint praying for the revocation or suspension of her occupational licenses, on the basis that they were her competitors and thus disqualified as having a pecuniary interest in the matter, the court in State ex rel. Beddall v Lonctot (1963) 62 Wash 2d 845, 384 P2d 877, 97 ALR2d 1201, found no defiance of due process where the legislature, acting within its permissible discretion, had decided that qualified practitioners of the same calling are competent to be hearing examiners in a revocation proceeding of other members. In refusing to single out one group within the calling as disqualified, the court noted that the pecuniary interest of the appointed shop owners was speculative and indirect, and that, in any event, having one competitive group within the calling dominate a licensing committee was not in itself a violation of due process.

In the few cases within the scope of this annotation where the question of equal protection has been discussed, the courts have decided on the basis of whether or not there was sufficient specific evidence present to support the charge of bias. Defendants state as a positive fact there is no such evidence in this case and further by Stipulation No. 11 the Board members say they will render a fair and impartial decision if permitted to hear these charges. 97 A.L.R.2d 1222.

The "Rule of Necessity" is held to apply in some instances and would certainly be applicable in this case since there is no statutory provision for reappointing another state board in the event the present board is not permitted to hear these charges. Beginning on page 1222, 97 A.L.R.2d, we find the following:

"There is an exception, based upon necessity, to the rule of disqualification of an administrative officer, to the effect that disqualification will not be permitted to destroy the only tribunal with power to act, or to prevent an otherwise disqualified officer from acting if his failure to act would result in a failure of justice. This exception has been applied in several cases involving license revocation or suspension proceedings wherein a member of the hearing body, who was also a member of the licensee's profession or occupation, was alleged to have been disqualified by bias or interest.

"United States.—Brinkley v Hassig (1936, CA10 Kan) 83 F2d 351.

"Arkansas.—Measles v Owens (1932) 185 Ark 106, 46 SW2d 40.

"Indiana.—Stone v Fritts (1907) 169 Ind 361, 82 NE 792, 15 LRA NS 1147.

"Maryland.—Board of Medical Examiners v Steward (1954) 203 Md 574, 102 A2d 248, supra § 3[d].

"Montana.—State ex rel. Yuhas v Board of Medical Examiners (1959) 135 Mont 381, 339 P2d 981."

Further supporting the rule of necessity, Lee Optical Company of Alabama, Inc., the employer of the plaintiffs herein at the time these charges were filed, advertised extensively throughout the State of Alabama that their one

low price included "a scientific eye examination" and other similar phrases so it would have been impossible for the State Board members to not have some general knowledge of the claims and advertising of the employer of the plaintiffs herein who continued to conduct eye examinations and condoned this advertising for almost three months, up until the time these charges were filed, when the advertisements were changed some but as held by the Circuit Judge in the Lee Optical trial in Circuit Court at Montgomery, in his decree, "the advertising was not thereafter changed to any great extent." In this case, the statute provides the State Board as the only tribunal with the power to revoke an optometrist's license and thus, the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises must be applied. In the case of *Brinkley* v. *Hassig* (1936), C.A. 10, Kan., 83 F.2d 351, the Court emphasized that absent such provisions for substitution of personnel or tribunal, then

> "The law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal. The Court concluded by adopting the language of the trial court: 'The members of the board were not disqualified because they knew of [the plaintiff's] methods prior to the hearing and condemned them. [His] methods were so notorious that ignorance of them by members of the board was an impossibility and such knowledge compelled condemnation.' "

5.

Whether the court erred in finding the plaintiffs had been harassed by defendants in their irreparable damage on the evidence before it.

Defendants urge that there has been absolutely no evidence of harassment of the plaintiffs as alleged in their complaint. Plaintiffs argued that they had been in litigation with the State Board in three cases prior to the filing of the Lee Optical case and the plaintiffs as their employer. Two of these suits involve Board rules and one involved a city ordinance of Bessemer, Alabama, and it was filed by Busch Jewelry Company. Neither the State Board nor the plaintiffs were involved in any way in this suit. The first case was *Alabama State Board of Optometry* v. *Busch Jewelry Company,* 261 Ala. 479, 75 So.2d 121 (October 7, 1954). The second case was *Busch Jewelry Company* v. *City of Bessemer,* 269 Ala. 180, 112 So.2d 344 (May 21, 1959), and the third case was filed against the State Board attacking regulations that had been adopted by the State Board, and this Dr. McCrory is one and the same as the Dr McCrory shown as a plaintiff herein and was an employee of Lee Optical. This is the case of *William B. McCrory* v. *William C. Wood, et al.,* members of the State Board of Optometry and Alabama State Board of Optometry, decided by the Supreme Court of Alabama, on January 21, 1965, and reported in 171 So.2d 341. This decision was rendered on January 21, 1965, some ten months prior to the filing of the charges involved herein. Certainly there was no harassment of the plaintiffs or anyone indicated by these suits and the record of trial of the case now before this Honorable Court (Stipu-

lation of Facts, Appendix K), shows no acts of harassment against them or acts of disqualification on the part of the State Board members. As a matter of fact, paragraph 11 of the stipulation states that if the individual members of the State Board of Optometry were called to testify that each of them would testify that he was not prejudiced against the plaintiffs and in his judgment could render a fair and impartial verdict on the charges brought against them.

The defendants therefore urge that the plaintiffs have failed to support their burden of proof in support of their charges of harassment, bias and prejudice on the part of the State Board members. The court erred in holding that since the individual members of the State Board of Optometry are substantially the same individuals who signed affidavits in 1965, stating or supporting proceedings charging that the plaintiffs had committed the violations charged in the proceeding, and conviction of the offenses charged and suspension of licenses are but predetermined formalities with no element of a fair trial. The undisputed testimony is that Dr. Thomas Gibson, member of the State Board, is the only one who signed anything and that was the verification of the bill of complaint against Lee Optical Company of Alabama, Inc., and the plaintiffs as employed optometrists and it was error to hold that conviction and suspension of licenses was but predetermined formalities with no element of a fair trial.

6.

Whether the court erred in assuming from the evidence before it that a hearing before the State Board of Optometry would be a mere formality leading to revocation of the licenses of the plaintiffs.

A proceeding such as this could never reach all the facts and issues because they would be limited to a relatively small part of the overall picture. Actually this proceeding puts the members of the State Board of Optometry on trial for alleged bias, prejudice and pecuniary gain and leaves out the major issue of whether the plaintiffs have violated the optometry law and should be answerable to the only tribunal created by law and qualified to pass on the evidence presented to it by both sides. A reading of the decree in the *State Board of Optometry* v. *Lee Optical* case in Circuit Court at Montgomery will point up many of the questions of fact that both sides could never agree and stipulate on. This Lee case is now pending on appeal before the Alabama Supreme Court. The trial judge made his findings on the conflicting evidence before him in the state court Lee trial. One of the many instances of this would be on the steps necessary to make a thorough examination. The order and opinion of the three-judge tribunal in the lower court was based on the facts that the respective parties could agree on but which are obviously only a few of the controversial questions as reflected in the state court Lee decision. Notwithstanding this, the trial court found from the evidence before it that a hearing before the State Board of Optometry would be a mere formality leading to revocation of the licenses of the plaintiff optometrists. The court erred in assuming as it did throughout its opinion

that as a result of any hearing before the State Board of Optometry their decision would be one of revocation of license. From a study of the reported cases herein and elsewhere, it is obvious that revocation of license is a penalty seldom meted out by a licensing board in any of the licensed professional groups. Usually there is a suspension for a reasonably short time and this is often followed by probation. It has been stated many times by the attorneys for the State Board of Optometry that they had no desire to run these plaintiff optometrists or any optometrists simularly situated out of Alabama because they are needed in Alabama in their own professional practices serving the needs of the people in the community where they practice with their allegiance running directly to their patient and no one else. This need is demonstrated by the fact that in 1969 a school of optometry was located in the medical complex in Birmingham, Alabama, and it now has second-year students in this optometry school (Stipulation 14). The *Bracken Jewelry* case, *supra*, not only holds optometry to be a profession in Alabama but also points out the obligation of an optometrist or any other professional man is the welfare of his patient and not the corporate employer or lessor whose primary interest is his search for profits in the marketplace (*Sears* v. *Mississippi* case, *supra*) so a professional man cannot properly and lawfully serve two masters—the corporate entity and his patient.

If this Honorable Court sustains the lower court in this matter, and the injunction against the Alabama State Board of Optometry and their successors is upheld, prohibiting them from hearing the charges against the plaintiffs now pending against them, then these optometrists

would be free to remain where they are, or go into some other similar type operation in Alabama and the State Board of Optometry would be unable to cope with this matter because not only the defendant members of the Optometry Board are enjoined but also their successors in office and since this is the only tribunal created by law in Alabama to hear such charges when filed before it, there could never be a hearing on such charges before the State Board.

If on the other hand, this Honorable Court directs a reversal and dismissal of the trial tribunal, the plaintiffs are afforded an adequate remedy in Alabama because they can test the qualifications of the State Board members by a mandamus proceeding in the state court where there would be ample opportunity for the plaintiffs to present their claims of disqualification and the individual board members would be given an opportunity to testify in court on the matters presented and so long as a quorum of three Board members are left, a hearing on the charges could be held.

In the event of a reversal and dismissal in this case and the plaintiff optometrists passed up their right to file a mandamus proceeding and stood trial before the State Board where, by law, they would be given ample opportunity to cross-examine witnesses, be represented by counsel and produce witnesses on their own behalf and if the State Board reached a decision that was not objectionable to the individual optometrists, then there would be no reason to carry the matter further. If such ruling was objectionable they have the right of appeal all the way up to the Alabama Supreme Court as pointed out heretofore in

this brief. Any preserved federal question could be reviewed by this Honorable Court on application for certiorari.

The situation in this case is quite unusual in that this federal court suit was filed before there had been a hearing before the State Board. Almost all of the other reported cases involved appeal procedures either in state court or the federal courts after the record was made before the State Board and a decision reached and announced by it. This has been described as a drastic procedure in other civil and criminal matters as we will point out later with citations in this statement. We, therefore, urge with all the power at our command that this Honorable Court give the utmost consideration to the impact of the opinion heretofore rendered by the trial court not only upon optometry in Alabama but its impact on all licensing boards throughout the country. There are many similarly appointed Boards serving just as this State Board and this would upset the entire system of professional licensure now written into the laws of practically every state.

7.

Whether the court erred in overruling defendant's motion to dismiss this action.

We urge that the trial court committed error in overruling defendants' motion to dismiss this action. This motion was included and brought along at each stage of the pleadings in this case. We feel that Sections 192 and 206, Title 46, of the optometry law, Code of Alabama, are constitutional, having been so held in *McCrory* v. *Woods*, *supra*, by the Alabama Supreme Court and in keeping with the additional cases cited under Questions Presented, No. 1 and No. 2, *supra*.

This involves a situation where charges that were pending against each of the plaintiffs before the defendant State Board were scheduled for hearing and before any hearings were held on these charges, this suit was filed resulting in the injunction herein against the State Board and their successors in office from conducting hearings on any of these charges. This presents a different situation to most of the reported cases where suit is filed in federal court after the hearing has been held and a decision rendered by the State Board. On the basis of the stipulation herein and the pretrial order, we do not believe there are sufficient facts shown to either disqualify the State Board for bias, prejudice, pecuniary interest or harassment as charged.

In *Miller* v. *Aldridge*, 103 So. 835, the Alabama Supreme Court held the proper remedy to be by mandamus to compel members of a State Board of Accountancy to recuse themselves as disqualified to pass on charges for

revocation of a certificate to practice, p. 838, and in doing so quoted from *Lehmann*, 263 U.S. 394, 44 S.Ct. 128, 68 L.Ed. 354, as well as the cases cited on page 839: *Ex parte State Bar Association*, 82 Ala. 113, 8 So. 768; *McConnell* v. *Goodwyn*, 189 Ala. 390, 66 So. 675, Ann.Cas. 1917A, 839. Since the order of this Court disqualified not only the present members of the State Board of Optometry but their successors in office as well, this destroys the only tribunal established by law in Alabama to hear the charges and thus it becomes imperative that the plaintiffs be required to pursue the proper remedy of mandamus in Alabama where a full hearing could be held in court on the question of disqualification with the right of appeal available to either side. If the court in such a proceeding found the board members disqualified, then an appeal could be made to the Alabama Supreme Court just as it was in this *Miller* v. *Aldridge* case. In the case of *Beam* v. *Fulwiler*, 456 P.2d 325, the Supreme Court of Washington held that where a hearing board is disqualified and there is no provision for another tribunal to hear the matter, the court is possessed of inherent jurisdiction to hear and determine the controversy on its merits. It is unthinkable that the trial court in this case should be required to hear the charges against each of the plaintiffs after having destroyed the only tribunal provided by law in Alabama to hear the charges, so this adds impetus to the defendants' contention that this case should be dismissed and let the matter be decided in Alabama either by mandamus in the courts or by hearing before the State Board.

The defendants urge there has been no mixing of functions in this matter of sufficient importance to dis-

qualify the entire membership of the State Board. By Stipulation No. 11, the individual members of the State Board state they would each testify that he was not prejudiced against plaintiffs and in his judgment could render a fair and impartial verdict on the charges brought against them. There has been no activity shown on the part of the members of the State Board such as that in the *Miller* v. *Aldridge* case, *supra*. The case of *Mack* v. *Florida State Board of Dentistry*, 296 F.Supp. 1259, does not apply to this case because the charges were prepared and filed by the Alabama Optometric Association with the State Board and there was no mixing of functions that would disqualify the members of the State Board and there has been no hearing on the charges.

From the above, it is clear that we have in this case charges pending before the State Board which have been held in other cases to be quasi-criminal or quasi-judicial. They are definitely administrative proceedings as held in *Engleman* v. *Cahn*, 425 F.2d 954, and the trial court cited this case to show that the Anti Injunction Act, 28 U.S.C. 2283, does not apply to administrative proceedings.

In *Samuels* v. *MacKell*, 91 Sup.Ct. 764 (1971), the appellants charge that trial of the indictments against them in state courts would harass them, and cause them to suffer irreparable damages, and they therefore prayed that the State Board should be enjoined from further proceedings. In the alternative, appellants asked the Court to enter a declaratory judgment to the effect that the challenged state laws were unconstitutional and void for the above and additional grounds set out in the opinion. The three-judge

Court hearing this matter held the New York criminal anarchy law was constitutional as it had been construed by the New York courts and held the complaint should therefore be dismissed. 288 F.Sup. 348 (D.C.S.D. N.Y., 1968).

It would appear that an essential element in the *Samuels* case and others is that there must be allegations and proof that a trial of indictments (charges before the State Board here) in state courts would harass them, and cause them to suffer irrepairable damages and cited as follows from page 766 of the *Samuels* case:

> "In No. 2, Younger v. Harris, 400 U.S. —, 91 S.Ct. 746, 27 L.Ed.2d —, we today decided on facts very similar to the facts in these cases that a United States District Court could not issue an injunction to stay proceedings pending in a state criminal court at the time the federal suit was begun. This was because it did not appear from the record that the plaintiffs would suffer immediate irreparable damages in accord with the rule set out in Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943), and many other cases. Since in the present case there is likewise no sufficient showing in the record that the plaintiffs have suffered or would suffer irreparable damages, our decision in the *Younger* case is dispositive of the prayers for injunctions here. * * *"

In the pending case the constitutionality of Sections 192 and 206 of the Alabama optometry law are alleged to be unconstitutional, but as in *Samuels*, the Alabama Supreme Court had construed these two sections to be constitutional in *McCrory v. Wood, supra.* Additionally, the plaintiffs charged the trial of the charges before the State Board would harass them and cause them to suffer irrepa-

rable damages and prayed for injunctive relief against the State Board, its present members and successors in office, and we would urge, in the present case, that no valid proof of harassment, irreparable damage and bad faith on the part of the State Board has been proved and if the mere trial of the charges before the State Board would constitute harassment and irreparable damage, then no such charges could ever be tried before any administrative body. We feel the allegations of harassment and irreparable damages alleged by plaintiffs herein, are without merit.

There is the later case of *Henry* v. *First National Bank of Clarksdale*, 444 F.2d 1300 (decided June 23, 1971), which we feel further supports the motion of the defendants to dismiss, first on the grounds that the Alabama Supreme Court has held Sections 191 and 206 of the Alabama Optometry law to be constitutional, *McCrory* v. *Wood, supra*, and, secondly, the mere filing of the charges herein does not in itself constitute harassment or irreparable damage and, as contended by defendants herein, there has not been a sufficient showing on the part of the plaintiffs to show bad faith on the part of the State Board and its members such as would constitute harassment and irreparable damage. Thirdly, in addition to their right of a hearing before the State Board on the charges pending in Alabama, the proper procedure to challenge the qualifications of such Board members is well established as being that of mandamus wherein there could be a full hearing and both sides presented to a court and a decision reached on the alleged disqualification of State Board members. *Miller* v. *Aldridge, supra.*

In such a mandamus hearing, the alleged pecuniary interest of the State Board members could be determined. Such a pecuniary interest would have to be substantial to constitute disqualifications as held in the case of *In re Heirich* (1956), 10 Ill.2d 357, 140 N.S.2d 825, 67 A.L.R.2d 827, *cert. den.* 355 U.S. 805, 2 L.Ed.2d 49, 78 S.Ct. 22, and found in 97 A.L.R.2d, page 1216. This was a disbarment proceedings in which one of the commissioners should have disqualified himself because of interest, since he was a partner in a law firm that represented several members of a railroad association which had financed and directed the prosecution of the charges against the accused. Citing *New Jersey State Board of Optometry* v. *Nemitz*, 21 N.J. Super. 18, 90 A.2d 740, *supra*, § 3(B).

There are numerous cases holding that the pecuniary interest was found too remote to be disqualifying. A writ of mandamus was sought in *Ex parte State Bar Association*, paragraph 1890, 92 Ala. 113, 8 So. 768, 12 L.R.A. 134, to compel a circuit judge to proceed in a disbarment action, where the judge had disqualified himself on the basis that he, as a dues paying member of the incorporated bar association bringing the disbarment action, had a pecuniary interest in the outcome in view of the liability of the bar association for costs of the proceedings should the determination be adverse to the association. Pointing out that the bar association was not a capitalized commercial or financial concern, its members were not stockholders, and its purposes were social, ethical and public, the Supreme Court granted the writ and held that even if the association owned property in which the members would share upon its dissolution, the interest was too remote and specu-

lative to disqualify a member from sitting as a judge or juror in a case to which the bar association was a party. This case supports our contention that the proper remedy to test the qualification of a judge or board member is by mandamus which has not been done in this case.

Reference is made to *State ex rel. Beddall* v. *Lonctot* (1963), 62 Wash.2d 845, 384 P.2d 877, 97 A.L.R.2d 1201. Under Questions Presented Number 4, we quoted from several cases in the annotation to this *Beddall* v. *Lonctot* case in support of our Question Number 4 and by reference will be adopted in support of our motion to dismiss on the question of pecuniary interest.

The plaintiffs urge that the Lee Optical Company in 1969 sold 75,000 pairs of glasses in Alabama. This is Stipulation 13. The trial court mentions this in its opinion. We cannot lose sight of the fact that in the Lee Optical case in state court, granting an injunction against Lee Optical, paragraph 8 of the trial court decree specifically provides that it will not be construed to enjoin Lee Optical Company of Alabama, Inc., from pursuing the trade or business of a dispensing optician, so long as it does so in a lawful manner and so long as it does not attempt to unlawfully practice optometry through its agents, servants or employees, or through any other arrangement, either directly or indirectly, anywhere in the State of Alabama in any establishment owned or controlled by or in any manner connected with it. From this it can readily be seen that Lee Optical can continue to do business as a dispensing optician and they may or may not sell the same number of pairs of glasses in the future as they did in 1969. It was the opinion

of the trial court, with reference to the 75,000 pairs of eyeglasses sold in one year, "presumably if plaintiffs' activities are suspended, defendants would share in this annual business." According to this reasoning, no licensing board could escape the allegation of pecuniary interests, be he an association member or not, on the basis that if the board voted to disbar, revoke or cancel the license of the person charged, then the board members would share in the annual practice or business of the licensed professional charged. This reasoning and presumption is untenable and we know for a fact that the optical department of Sears Roebuck and Company in Jackson, Mississippi, which was involved in the *Mississippi Sears* v. *State Board* case, *supra*, is still engaged in the sale of glasses as an optical dispensary and has been so continuously engaged since the decision in the *Mississippi Sears* case, *supra*, for almost twenty years. Certainly this optical dispensary department in Sears would not have continued through the years if it was not profitable without having an optometrist on the premises or available to examine eyes, which was prohibited by the injunction in the *Sears Mississippi* case, *supra*. For the same reason, it is contemplated and by the court decree permitted, that Lee Optical Company of Alabama, Inc., will continue its business in Alabama as an optical dispensary but, as held in the Lee decree by the trial court, it is not in the best interest of the public welfare that optometrists or physicians be permitted to have any contractual agreement whereby they will accept customers from Lee Optical for the purpose of doing a refractive type examination to provide the customer with a prescription and return him to Lee Optical to purchase glasses.

The case of *Eugene T. Ventresca, O.D.* v. *Ohio State Board of Optometry*, No. 71-2, Court of Appeals of Franklin County, Ohio, decided April 13, 1971 (not yet reported), reversed and the injunction dissolved and case dismissed, proves helpful in this matter. The facts are similar in that Dr. Ventresca was sent a notice by the State Board referring to certain allegations against him which would lead to a hearing before the State Board. Dr. Ventresca promptly filed an injunction suit to enjoin the board from hearing the matter. When the case reached the Ohio Court of Appeals, it had the following to say:

"* * * No one can claim legislation to be unconstitutional until he has been hurt by its operation. In this case, at this point, the plaintiff, Ventresca, has not only not been hurt by the challenged statute, he merely anticipates that he will be. There has been no decision rendered by which he can claim to be hurt since he has, up until now, forestalled a decision. (See such cases as *State, ex rel. Lieux* v. *Village of Westlake* [1951], 154 Ohio St. 412, *Curtiss* v. *City of Cleveland* [1959], 170 Ohio St. 127, *Greenhills Home Owners Corp.* v. *Village of Greenhills* [1966], 5 Ohio St. 2d 207, and others which discuss these concepts.)"

The Court further said:

* * * * * *

"Any decision of the board is subject to appeal under R. C. 119.01 through 119.13. An action in equitable injunction will not operate to forestall a hearing by the board when a resulting decision, if adverse as it would appear the plaintiff anticipates it will be, may be regularly appealed.

"When regulations of the board are questioned, the Supreme Court has made it abundantly clear that it

will not aid in making or revising the rules of boards but will only decide whether those rules are reasonable and lawful as applied to the facts of a justiciable case. In *Fortner* v. *Thomas* (1970), 22 Ohio St. 2d 13, the Supreme Court says that it will not consider the lawfulness of an administrative regulation, or a legislative act, in a vacuum, but only when an affected person is involved.

"It is submitted that the equitable procedure here invoked required the trial court to pass upon the lawfulness of a regulation in a vacuum, that is, before anyone was hurt; in fact, before even the board had acted upon the complaints, 'allegations,' before it.

"The plaintiff is not entitled to an injunction. There is available an adequate remedy at law by way of appeal from any administrative order which affects him adversely.

"The appeal of the appellant board is well taken.

"The judgment of the trial court is reversed and the injunction dissolved.

"Rendering the judgment the trial court should have rendered, the complaint of the plaintiff is dismissed at his costs.

"WHITESIDE and REILLY, JJ., concur."

On the question of harassment, we find, in the case of *Texas State Board of Examiners in Optometry* v. *Carp*, 343 S.W.2d 242, as follows:

"[4] Respondent alleged, among other things, that the members of the Board, who are practicing optometrists, were acting maliciously in furtherance of a conspiracy to harass and annoy him and destroy his practice. He directs our attention to the evidence show-

ing that on one occasion some fourteen of respondent's employees were requested to attend a meeting in Dallas to determine that one member of the Board is a co-owner of respondent's largest competitor, and several of respondent's employees have left him to accept employment with the latter organization. In some instances the discussions which brought this about occurred shortly before or after a meeting of the Board at which the employee in question had been notified to appear. These circumstances do not warrant the conclusion that there is a conspiracy, or that the Board has made any improper use of its powers, to annoy, harass or damage respondent.

* * * * * *

"[6] If any charge is filed against respondent because of his noncompliance with the Corporate Practice Rule, the ultimate question to be decided is whether he has violated Article 4563(i). Noncompliance with the rule merely makes a prima facie case, and respondent can defeat the complaint by showing that he does not place his license at the disposal or in the service of an unlicensed person. Whether respondent will be able to make that showing is a matter of conjecture, and any injury to him resulting from the Board's interpretation of the rules is equally a matter of conjecture. In the event the Board finds that he has violated the statute, it may but is not required to revoke his license. If his license is revoked, the statute gives him the right of appeal to the district court, and the court may then stay or enjoin the decision of the Board when such action appears to be necessary for the protection of his rights.

* * * * * *

"As pointed out in Turner v. Bennett, Tex.Civ.App., 108 S.W.2d 967, 971 (no writ), 'there is a vast difference in a court reviewing a final order of an adminis-

trative board and in prohibiting such board from making any order or from prosecuting an inquiry to ascertain whether any order will be necessary. That courts are without authority to thus interfere with commissions and administrative departments of the government in the lawful exercise of duties and functions committed to them by law is well settled.' See also State Board of Barber Examiners v. Comer, Tex. Civ.App., 109 S.W.2d 1012 (no writ). Various reasons are assigned by the courts as grounds for refusing to grant relief against threatened or pending administrative action. See 42 Am.Jur. Public Administrative Law, p. 574, § 195 et seq. A board or commission created by the Legislature with authority and responsibility for determining in the first instance whether certain action shall be taken is not subject to restraint by the courts whenever it appears that an erroneous conclusion has been reached on some preliminary or procedural question. Any other rule would afford an opportunity for constant delays in the course of administrative proceedings, and there is no real need for equitable relief in the ordinary case until a final administrative determination has been made.

"The temporary injunction issued in this case prevents the Board from exercising in certain instances the powers vested in it by statute. Proceedings under Article 4563 are begun by filing charges in writing and under oath, and the charges may be made by any person. Article 4556 gives the Board power to issue subpoenas, administer oaths, take testimony, and institute actions in its own name to enjoin the violation of any provision of the Act. If a complaint is presented charging that a licensee has been guilty of any misconduct constituting grounds of revocation, the Board is authorized by Article 4563 to accept and file the same, issue notices, conduct a hearing, and determine the charges upon their merits. In performing these func-

tions, it must hear evidence, ascertain the facts, interpret the statutes and its own rules, apply the same to the facts, and determine whether to cancel, revoke or suspend the license of the person charged. No contention is made that these statutes are invalid, and it is our opinion that the Board is entitled to and should exercise the powers which they confer and discharge its lawful responsibilities without interference from a court of equity.

"The judgments of the courts below are reversed and the temporary injunction is dissolved."

On the question of Board members being members of the association filing the charges as grounds for disqualification, we find in *Michon* v. *Louisiana State Board of Optometry Examiners*, 121 So.2d 567, the following:

"[1] The first assignment of error contends plaintiff did not receive a fair hearing before the Board which conducted the hearing. His position is that Drs. Hewitt and Roberts should have recused themselves from any participation in the hearing. The only reason advanced for this argument is that both of these members of the Board were also members of the Southwest Louisiana Optometric Society, which organization was responsible for the charges filed against him. It was stipulated in the record that neither Dr. Hewitt nor Dr. Roberts was present at the meeting of the Society when action was taken directing that the charges be filed. Notwithstanding this fact, it is argued without supporting evidence, that these members of the Society were aware of the charges and for this reason alone they were disqualified to sit in judgment upon the rights of plaintiff. A careful examination of the record fails to reveal any indication that either of the Board members possessed any preconceived resolution of the charges

against appellant. Furthermore, it was not essential that such charges be filed by a professional society, but they may be presented to the Board by an individual. An additional reason plaintiff cannot claim prejudice on this score is that the charges so made and considered by the Board may be reviewed by the courts, as is being done in this instance. The defense so made is without merit."

From the above cited cases in this statement, we have urged that it is abundantly clear that the plaintiffs herein should pursue their remedy either by a hearing before the State Board or some appropriate action in the state courts of Alabama and that in this case, the order of the trial court granting an injunction and hearing the case on its merits should be reversed and the case dismissed at the cost of the plaintiffs.

The Order on Pre-Trial Hearing is shown as Appendix L.

The Notice of Appeal to the Supreme Court of the United States is shown as Appendix M.

CONCLUSION

It is submitted that the decision of the three-judge district court is not supported by law and the facts in this case as shown by decisions of this Court, other federal courts and state courts. The decision of the trial judges decides important issues of federal constitutional law which should be considered by this Honorable Court. The defendant State Board of Optometry earnestly believes the questions presented by this appeal are substantial and that

they involve the public health and welfare and are of public importance.

Respectfully submitted,

J. G. L. MARSTON, III
DONALD GEORGE VALESKA, II

BY_____
Assistant Attorneys General
250 Administrative Building
64 North Union Building
Montgomery, Alabama

WILLIAM BAXLEY
Attorney General of Alabama
State Capitol
Montgomery, Alabama

RICHARD A. BILLUPS, JR.,
P. O. Box 1056
Jackson, Mississippi 39205

Attorneys for Appellees

Date: November _____, 1971

CERTIFICATE OF SERVICE

I, Richard A. Billups, Jr., one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of November, 1971, I served copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on all parties required to be served, by depositing a copy of such Jurisdictional Statement in the United States Post Office, properly addressed, with first class postage prepaid, as follows:

1. On Honorable Harry Cole
   P. O. Box 116
   Montgomery, Alabama 36101

2. On Honorable Douglas E. Bergman
   Mercantile Bank Building
   Dallas, Texas 75201

_____
Richard A. Billups, Jr.